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## Rose Is in Red, Black Sox Are Blue: A Comparison of *Rose v. Giamatti* and the 1921 Black Sox Trial

Michael W. Klein

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# Rose Is in Red, Black Sox Are Blue: A Comparison of *Rose v. Giamatti* and the 1921 Black Sox Trial

by  
MICHAEL W. KLEIN\*

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*"It is a wonderful combination—the greatest team I ever had. . . . It is by all odds the greatest team in the American League."*

Charles A. Comiskey, describing the  
1919 Chicago White Sox.<sup>1</sup>

*"I doubted the outcome. . . . I don't know what the odds were but I guess I had about a 50-50 chance."*

Pete Rose, upon learning that a temporary restraining order had been issued against a hearing into his alleged gambling activity.<sup>2</sup>

*"Pete Rose is not Shoeless Joe Jackson [of the 1919 Chicago White Sox]. What Pete did is against the rules. What Jackson did was against the law. Pete made a mistake. Jackson committed a felony. . . . One guy is a crook, the other just dumb."*

Jim Murray, columnist for the *L.A. Times*, after Rose's lifetime suspension by Commissioner A. Bartlett Giamatti.<sup>3</sup>

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1. G. AXELSON, "COMMY": THE LIFE STORY OF CHARLES A. COMISKEY 218 (1919).  
2. Wheeler, *Rose Grets Ruling in Private*, N.Y. Times, June 26, 1989, at C5, col. 1.  
3. Murray, *Squeezed Play Ensures His Place in Hall of Fame*, L.A. Times, Aug. 25, 1989, § III at 11, col. 1.

## Introduction

Commissioner of baseball A. Bartlett Giamatti imposed a lifetime suspension on Cincinnati Reds manager Pete Rose because an investigation revealed that Rose may have gambled on Major League Baseball games, specifically games involving the Reds, between 1985 and 1987. After the suspension, on August 24, 1989, Giamatti said, "Baseball had never before undertaken such a process because there had not been such grave allegations since the time of Landis."<sup>4</sup> Giamatti was referring to the first Commissioner of Baseball, Kenesaw Mountain Landis, who in 1921 banned eight members of the Chicago White Sox who were accused of conspiring with gamblers to deliberately lose the 1919 World Series to, ironically, the Cincinnati Reds.<sup>5</sup>

The "Black Sox" (as the eight White Sox were called) and Pete Rose scandals are similar. Gambling and the presence of bookmakers shadowed both incidents, and the existing baseball commissioner chose to protect the integrity of the game in both instances by imposing baseball's harshest penalty: permanent ineligibility.<sup>6</sup> Additionally, those ostracized were the stars of their times. The eight Black Sox were instrumental in leading their team to win the 1917 World Series and the 1919 American League pennant. "Shoeless" Joe Jackson, Chicago's left fielder, held a lifetime batting average of .356, the third-highest of all time.<sup>7</sup> Right-handed pitcher Eddie Cicotte led the league in wins in 1917 (28) and in 1919 (29), followed closely in 1919 by Claude "Lefty" Williams (23).<sup>8</sup> Center fielder Oscar "Happy" Felsch was a lifetime .293 hitter and led the league in putouts in 1917 and in assists in 1919.<sup>9</sup> Equally strong fielders were first baseman Charles "Chick" Gandil, who had the top fielding average in the league four times between 1912 and 1919, and third baseman George "Buck" Weaver.<sup>10</sup> Rose, of course, is baseball's all-time hit leader (4256), and has played in the most games (3562), recorded the most at-bats (14,053), and hit the second-most doubles (746).<sup>11</sup>

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4. Giamatti: *Sad End of a Sad Story*, USA Today, Aug. 25, 1989, at 10C, col. 3.

5. *Excerpts from Report Submitted by Dowd to Commissioner Giamatti*, N.Y. Times, June 27, 1989, at 46, col. 1 [hereinafter *Dowd Excerpts*].

6. MAJOR LEAGUE RULES 15(c), 21(d), 21(f) (1976).

7. THE BASEBALL ENCYCLOPEDIA 1096 (J. Reichler ed. 1988).

8. *Id.* at 268, 276.

9. *Id.* at 267, 274, 947.

10. *Id.* at 243, 263, 267, 274. Weaver had the American League's top fielding coverage in 1917. *Id.* at 267. The other Black Sox were shortstop Charles "Swede" Risberg and utility infielder Fred McMullin.

11. *Id.* at 1409.

Beyond the apparent similarities between the Black Sox incident of 1919 and the Pete Rose scandal of 1989, stark contrasts in the overall conditions of Major League Baseball set them apart. The economic condition of the sport was much shakier in 1919, creating great economic pressures on team owners and players.<sup>12</sup> Baseball's exemption from anti-trust laws, an uncertain proposition in the earlier era, has been repeatedly upheld since then, while the power of owners over players through the reserve clause has been considerably weakened.<sup>13</sup> Even more importantly, the powers and authority of the Commissioner of Major League Baseball, created in the wake of the events of 1919, have been consolidated and upheld by the courts.<sup>14</sup> Finally, because of stricter state and federal gambling laws, baseball is safer today from the influences of illegal betting.<sup>15</sup>

## I

### Baseball in 1919 vs. Baseball in 1989: What a Difference 70 Years Make

#### A. The Economic Status of Major League Baseball

In 1919, baseball stood on shaky ground, due in large part to World War I. Secretary of War Newton D. Baker ordered the 1918 regular baseball season to end after Labor Day as the war continued overseas.<sup>16</sup> With teams confined to a 130-game schedule, attendance dropped by two million.<sup>17</sup> Fear of further losses after the war induced owners to cut players' salaries and extend the season to 140 games in 1919 (the schedule returned in 1920 to the 154-game schedule that had been the standard since 1905).<sup>18</sup> The owners' apprehensions proved groundless as attendance totals were higher than expected in mid-July, and the World Series was lengthened from four-out-of-seven games to five-out-of-nine games to capitalize on anticipated gate receipts.<sup>19</sup>

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12. See *infra* text accompanying notes 16-34.

13. See *infra* text accompanying notes 53-65.

14. See *infra* text accompanying notes 66-97.

15. See *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); see also *infra* text accompanying notes 98-118.

16. L. LOWENFISH & T. LUPIEN, *THE IMPERFECT DIAMOND* 96 (1980). Labor Day, Sept. 1, 1918, was a compromise date among Secretary Baker, American League President Ban Johnson (who announced suspension of play after July 21), and the owners (who lobbied for the completion of the scheduled season on Oct. 15). Basel, *The Troubled World Series of 1918*, *YANKEE MAGAZINE*, May 1990, at 40.

17. L. LOWENFISH & T. LUPIEN, *supra* note 16, at 96.

18. E. ASINOF, *EIGHT MEN OUT* 15 (1963); L. LOWENFISH & T. LUPIEN, *supra* note 16, at 152.

19. E. ASINOF, *supra* note 18, at 15-16, 110.

Broadcasting rights, unlike today, were not a source of major revenue during the 1919 regular season or World Series. Telegraph facilities in all major league ballparks and in the more important minor league ballparks sent out and received reports from games throughout the country.<sup>20</sup> For the World Series, Western Union telegraphed play-by-play action to halls in the major cities of the United States, where the positioning of players was re-created on large boards.<sup>21</sup> Radio did not become a powerful national medium until 1926, when the Radio Corporation of America (RCA), General Electric (GE), and Westinghouse formed the first major network, the National Broadcasting Company (NBC).<sup>22</sup>

By 1989, Major League Baseball had transcended the 1919 fears of falling attendance and unattended World Series. New attendance records were set each year during the 1970s, which generated considerable broadcast revenue. Baseball was so popular in 1988 that Columbia Broadcasting Systems, Inc. (CBS) paid \$1.1 billion for the rights to broadcast the World Series, the league championship games, the All-Star game, and twelve games a year for four years starting in 1990.<sup>23</sup> Cable television flexed its broadcasting muscle when the Entertainment and Sports Programming Network (ESPN) won television rights to 175 major league games each year for four years beginning in 1990.<sup>24</sup> Individual teams cashed in on cable television's revenue as well. The New York Yankees received \$500 million from the Madison Square Garden (MSG) network for the right to broadcast most of the Yankees' games between 1991 and 2002.<sup>25</sup>

As the owners prepared their pockets for larger profits in 1989, players demanded larger salaries. Orel Hershisser, the 1988 Cy Young Award-winning pitcher for the Los Angeles Dodgers, signed baseball's most lucrative contract ever on February 16, 1989, receiving \$7.9 million over three years.<sup>26</sup> At that time, 108 players earned \$1 million or more, twenty-one of whom earned at least \$2 million a year.<sup>27</sup> Pete Rose him-

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20. *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 205 (1922).

21. E. ASINOF, *supra* note 18, at 4.

22. E. BARNOUW, *TUBE OF PLENTY: THE EVOLUTION OF AMERICAN TELEVISION* 53-54 (1975).

23. L. LOWENFISH & T. LUPIEN, *supra* note 16, at 23; Gerard *ESPN Will Pay \$400 Million for Baseball-Game Rights*, N.Y. Times, Jan. 6, 1989, at D1, col. 1.

24. ESPN paid \$400 million for the contract. Chass, *Another Record for Hershisser: \$7.9 Million Dodger Contract*, N.Y. Times, Jan. 6, 1989, at D1, col. 1.

25. *Id.* at D14, col. 2.

26. N.Y. Times, Feb. 17, 1989, at A29, col. 4.

27. *Id.*

self signed a two-year contract in November 1988, that called for \$500,000 a year to manage the Reds.<sup>28</sup>

The players of 1919 did not have such lofty expectations. On March 21, 1919, Babe Ruth ended his holdout from spring training and signed a three-year contract with the Boston Red Sox for \$27,000. Ruth had asked for \$30,000.<sup>29</sup> Most of the White Sox' salaries at this time were far below Ruth's, even for the stars. Jackson and Weaver never made more than \$6,000 a season, Cicotte received \$5,500 in 1919, Gandil and Felsch made about \$4,000 per year, and Williams and shortstop "Swede" Risberg each earned less than \$3,000.<sup>30</sup> The best-paid member of the White Sox was second baseman Eddie Collins, whose contract for \$14,500 was purchased for over \$50,000 in 1915 from the Philadelphia Athletics.<sup>31</sup> Chicago's World Series opponents made considerably more money than the average White Sox. Center fielder (and future Hall of Famer) Ed Roush earned \$10,000 in 1919, and pitcher Dutch Reuther, in the league for only two years, made almost twice as much as Cicotte, a 13-year veteran.<sup>32</sup>

Without the outside revenue from broadcasts, ball players in the early twentieth century were able to force large salaries only when an upstart league challenged the domain of Major League Baseball.<sup>33</sup> The Federal League, founded in 1913 as a minor league, was one example. Its team owners sought major league status in August 1913 and expanded eastward while trying to pry established stars from their major league teams. Few veteran players jumped to the new league, but those players staying in the American and National Leagues coaxed salary increases from their teams as a condition for staying. Every established player's salary nearly doubled at this time.<sup>34</sup>

#### B. "In Trusts We Trust": A Historical Look at the Legal Status of Major League Baseball

The challenge of the Federal League led to a court battle that threatened the antitrust status that baseball enjoyed as an enterprise up until 1919. In 1914, the New York State Supreme Court ruled in *American League Baseball Club of Chicago v. Chase* that "organized baseball"

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28. *Texas A&M Punished for Recruiting Violations*, L.A. Times, Sept. 10, 1988, at C3, col. 6.

29. *Babe Ruth Finally Signs with Boston*, N.Y. Times, Mar. 22, 1919, at 16, col. 6.

30. E. ASINOF, *supra* note 18, at 20, 60.

31. *Id.* at 18; L. LOWENFISH & T. LUPIEN, *supra* note 16, at 90.

32. E. ASINOF, *supra* note 18, at 21, 60.

33. The reserve clause and lack of player mobility also kept salaries down. See *infra* text accompanying notes 53-65.

34. L. LOWENFISH & T. LUPIEN, *supra* note 16, at 87.



(the 40 major and minor league teams) was not interstate commerce or trade subject to the Sherman Antitrust Act, because baseball dealt with players for their services and did not treat them as commodities or articles of merchandise.<sup>35</sup> In April 1919, however, the Supreme Court of the District of Columbia held that organized baseball did violate the Sherman Act in a case stemming from the dissolution of the Federal League.<sup>36</sup>

The origins of the case lay in a nine-count federal antitrust complaint filed in January 1915 by the Chicago Federal League team against Major League Baseball for denying the Federal League access to the player market.<sup>37</sup> The presiding judge was Kenesaw Mountain Landis, the future Commissioner of Baseball, who had been appointed in 1905 to the federal bench in Illinois by Theodore Roosevelt. Landis had earned a reputation as a "trustbusting" judge after he fined Standard Oil \$29,240,000 for antitrust violations (even though his decision was overturned).<sup>38</sup> In the case of the Chicago Federal League team, however, Landis withheld judgment to force a settlement.<sup>39</sup> Landis' strategy worked as the parties reached an agreement in December 1915. In exchange for dropping their case, the team owners in the Federal League received \$600,000 and were allowed to sell their players to any Major League club. In addition, the owners of the Chicago Federal League team were permitted to purchase the Chicago Cubs, and the owners of the St. Louis Federal League team were permitted to buy the St. Louis Browns.<sup>40</sup>

Not all of the owners in the Federal League received such favorable treatment in the settlement agreement. The owners of the Baltimore Terapins tried to keep Major League Baseball in their city, which had seen the Orioles, founded in 1901, move to New York after the 1902 season as the Highlanders (later the Yankees).<sup>41</sup> To counteract the folding of their

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35. *American League Baseball Club of Chicago v. Chase*, 86 Misc. 441, 459, 149 N.Y.S. 6, 16-17 (Sup. Ct. 1914). The court granted Chase's motion to vacate a preliminary injunction against his playing for the Buffalo Federal team, finding lack of mutuality and a common law monopoly. *Id.* at 467, 149 N.Y.S. at 16, 19.

The Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988).

36. *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore*, 269 F. 681, 682 (D.C. Cir. 1921), *aff'd*, 259 U.S. 200 (1922).

37. L. LOWENFISH & T. LUPIEN, *supra* note 16, at 88.

38. *Id.*; *United States v. Standard Oil Co.*, 155 F. 305, 321 (N.D. Ill. 1907), *rev'd*, 164 F. 376, 389 (7th Cir. 1908), *cert. denied*, 212 U.S. 579 (1909).

39. L. LOWENFISH & T. LUPIEN, *supra* note 16, at 89-90.

40. J. DWORKIN, *OWNERS VS. PLAYERS* 54 (1981).

41. L. LOWENFISH & T. LUPIEN, *supra* note 16, at 105. Major League Baseball returned to Baltimore when the St. Louis Browns moved there in 1953.

team, the owners of the Terrapins demanded the right to purchase the St. Louis Cardinals and to move the club to Baltimore.<sup>42</sup> This request was denied and the Terrapins' owners filed a suit in 1916 against the National League, the American League, the three members of the National Commission (the ruling body of the National League, the American League, and the minor leagues), and three Federal League officials, including the former president.<sup>43</sup> In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, the plaintiffs claimed that the disbandment of the Federal League and the consequent injury to the Baltimore club resulted from the defendants' acts in violation of the Sherman Act.<sup>44</sup> The Terrapins also argued that the National and American Leagues illegally restrained trade by controlling "practically all available players of sufficient skill to serve in a major league club, and thus the Federal League was unable to secure players capable of producing such exhibitions of baseball as the public demanded."<sup>45</sup>

The verdict reached in the Supreme Court of the District of Columbia (the forerunner of the Federal District Court for the District of Columbia) seriously threatened baseball's status in 1919. The court instructed the jury that the defendants had engaged in interstate commerce and that they had attempted to monopolize a part of that commerce.<sup>46</sup> The jury found that the defendants had conspired to destroy and did destroy the Federal League with the aim of perfecting their monopoly of professional baseball. The jury awarded the Baltimore owners treble damages of \$240,000.<sup>47</sup> The repercussions of such a ruling could have devastated organized baseball. The possibilities included the following:

- The severance of relations between the American and National Leagues;
- the severance of relations between the major leagues and the minor leagues; and
- a revision of players' contracts to eliminate the 10-day clause (under which a team could terminate all obligations to a player upon 10 days' written notice) and the reserve clause (under which a team could indefinitely renew a player's contract).<sup>48</sup>

This potential upheaval did not occur because the defendants were successful in the Court of Appeals for the District of Columbia (the fore-

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42. J. DWORKIN, *supra* note 40, at 55.

43. *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 207 (1922).

44. *Id.*

45. *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore*, 269 F. 681, 683 (D.C.Cir. 1921).

46. *Id.* at 684.

47. *Id.*

48. E. ASINOF, *supra* note 18, at 199.

runner of the United States Court of Appeals for the D.C. Circuit). The appellate court overturned the D.C. Supreme Court's decision in April 1921, holding that baseball does not violate the Sherman Act because "baseball is not [interstate] commerce, though some of its incidents may be."<sup>49</sup> The United States Supreme Court, per Justice Oliver Wendell Holmes, upheld the Court of Appeals' decision on May 29, 1922: "The business is giving exhibitions of base ball [sic], which are purely state affairs."<sup>50</sup> By 1989, the Supreme Court had entrenched the antitrust status of Major League Baseball. Although the Court now recognizes that professional baseball's exemption from antitrust laws is "an exception and an anomaly,"<sup>51</sup> federal courts have consistently abided by Justice Holmes' decision.<sup>52</sup>

### C. The Reserve Clause

Although it has maintained its antitrust status, professional baseball no longer enjoys the perpetual control over its players that characterized player-management relations in 1919. Management retained such control through the reserve clause, which required every player to sign with his club for one year and to enter into a new contract "for the succeeding season at a salary to be determined by the parties to such contract."<sup>53</sup> National League owners introduced the clause in September 1879 to reserve five players on each club for the 1880 season to prevent price wars.<sup>54</sup> By the late 1880s, every player's contract contained the reserve clause, which came to provide owners with perpetual renewal rights.<sup>55</sup> Players had no alternative but to retire if they did not like the contract offered by management, who deflated salaries by denying players an alternative market for their services.<sup>56</sup> Team owners argued that without the clause, players would flock to the largest cities and the richest teams.<sup>57</sup>

By 1919 some courts expressed doubts about the enforceability of the reserve clause, but it remained a part of the standard player con-

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49. *National League*, 269 F. at 685.

50. *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208 (1922).

51. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

52. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir.) *cert. denied* 439 U.S. 876 (1978); *Radovich v. National Football League*, 352 U.S., 445, 451 (1957); *Toolson v. New York Yankees*, 346 U.S. 356, 356-57 (1953).

53. *National League*, 269 F. at 687.

54. J. DWORKIN, *supra* note 40, at 10.

55. *Id.* at 11.

56. L. LOWENFISH & T. LUPIN, *supra* note 16, at 18.

57. *Id.* at 82.

tract.<sup>58</sup> The hardship the reserve clause imposed on players was a major factor in the Black Sox scandal. White Sox owner and president Charles Comiskey made the most of the reserve system during his reign from 1900 to 1931. He paid his players below-average salaries, knowing that they could do little about it.<sup>59</sup> Seeing no reason why they should not share in the higher-than-expected gate revenue the team was enjoying in the wake of the end of World War I, the 1919 White Sox held a clubhouse meeting in July and asked their manager to discuss with Comiskey the possibility of higher salaries. Comiskey did not budge and the players threatened to strike.<sup>60</sup>

A strike by an individual team was a tactic that Pete Rose (as a player) and his contemporaries never had to consider because of the advent of the baseball players' union, the Major League Baseball Players Association (MLBPA), founded in 1954. One of the biggest victories achieved by the MLBPA came in 1975, when it successfully argued before an arbitrator that the reserve clause allowed renewal of a contract for only one year.<sup>61</sup> That arbitration involved pitchers Andy Messersmith and Dave McNally. Neither player had signed a contract for the 1975 season and both believed that they should have been free agents for the 1976 season.<sup>62</sup> A federal court upheld the arbitrator's decision,<sup>63</sup> and baseball entered the free agency years that saw the average annual salary double to an excess of \$120,000 a year between 1976 to 1980.<sup>64</sup> In light of the traditional deference to the authority of the Commissioner of Baseball, the presence of an arbitrator in the McNally and Messersmith cases, and the subsequent upholding of the arbitrator's decision by a federal court, represented a considerable innovation.<sup>65</sup>

#### D. The Office and Powers of the Commissioner

In the aftermath of the Black Sox scandal, the leaders of the Major League created the Office of Commissioner and appointed an ex-federal judge, Kenesaw Mountain Landis, to the position. In the years between the scandals, courts repeatedly deferred to the authority of that office.

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58. See, e.g., *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198 (S.D.N.Y. 1890); cf. *National League*, 269 F. 681.

59. See *supra* text accompanying notes 30-32.

60. E. ASINOF, *supra* note 18, at 16.

61. *In re Twelve Clubs Comprising Nat'l League of Professional Baseball Clubs*, 66 Lab. Arb. (BNA) 101 (1975).

62. *Id.*

63. *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615, 617 (8th Cir. 1976).

64. L. LOWENFISH & T. LUPIEN, *supra* note 16, at 22.

65. J. DWORKIN, *supra* note 40, at 32. The first collective bargaining agreement, signed in 1968, provided for an impartial arbiter to settle players' grievance cases. *Id.*

Thus, Pete Rose's legal challenge to Commissioner Giamatti, was a bold, if unsuccessful, move.

Prior to 1919, baseball operated under rules articulated in the National Agreement of 1903. This pact resolved the dispute between the National League, founded in 1876, and the upstart American League, which was formed in 1900 and which was outdrawing the older league.<sup>66</sup> The American League refused the National League's offer in the fall of 1902 to absorb the four best American League clubs to form a twelve-team league. This refusal led to the signing of the National Agreement and to its pledge "to perpetuate baseball as the national game of America, and to surround it with such safeguards as to warrant absolute public confidence in its integrity and methods."<sup>67</sup>

The National Agreement also established the National Commission, comprised of the two league presidents and a chairman chosen by them, as the ruling body of baseball.<sup>68</sup> The agreement described the powers of its officers. The league presidents could regulate the actual playing of the game on the field and could enforce the rules instituted for governing the game; courts have interpreted these rules to encompass disciplining players who infringed the rules.<sup>69</sup> Further, the presidents could, under the respective constitutions, appoint, control, and instruct umpires, and suspend any umpire, manager, or player for "offering, agreeing, conspiring, or attempting to cause any game to result otherwise than on its merits."<sup>70</sup>

Even with the creation of the National Commission, several incidents preceding the Black Sox scandal indicated its inherent weakness and the need for stronger authority. Chairman Garry Herrmann lost the confidence of both leagues in 1915 when he allowed the St. Louis Browns to retain future Hall-of-Fame first baseman George Sisler, even though the Pittsburgh Pirates had originally signed Sisler while he was in high school.<sup>71</sup> In 1918, National League President John Tener resigned after Connie Mack, owner of the Philadelphia Athletics, got a court injunction against a ruling of the Commissioner that ordered pitcher Scott Perry back to the Boston Braves, for whom Perry had played before he joined an independent team and then the A's.<sup>72</sup>

The New York State Supreme Court found a distinct lack of central authority within professional baseball when it issued an injunction in Oc-

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66. L. LOWENFISH & T. LUPIEN, *supra* note 16, at 69-70.

67. *Id.* at 70.

68. *Id.*

69. *Id.*

70. American League Baseball Club of New York v. Johnson, 109 Misc. 138, 144-149, 179 N.Y.S. 498, 504 (Sup. Ct. 1919), *aff'd*, 179 N.Y.S. 898 (App. Div. 1920).

71. L. LOWENFISH & T. LUPIEN, *supra* note 16, at 67.

72. *Id.* at 76.

tober 1919 against an order by the American League president.<sup>73</sup> The case before the court involved the attempts of league president Byron "Ban" Johnson to suspend Boston Red Sox pitcher Carl Mays for deserting his team, which subsequently sold him to the New York Yankees.<sup>74</sup> Viewing the suspension as a punishment of the Red Sox and Yankees, the court held that Johnson had no authority under the American League Constitution to discipline the clubs of the league. Such power resided exclusively in the league's board of directors.<sup>75</sup> Even assuming the president had such authority, the court held that the transfer of Mays was not a punishable offense.<sup>76</sup> Alternatively, if Johnson's order was aimed at Mays, his act was still *ultra vires*. The court determined that, while section 20 of the American League Constitution gave the league president the power to "impose fines or penalties, in the way of suspension or otherwise, upon any manager or player who, in his opinion, has been guilty of conduct detrimental to the general welfare of the game,"<sup>77</sup> these powers were subordinate to the authority of each club as set forth in section 24. According to this section, each club had the authority to:

discipline, punish, suspend or expel its manager, players or other employ'es [sic], and these powers shall not be limited to cases of dishonest play or open insubordination, but shall include all questions of carelessness, indifference, or other conduct of the player that may be regarded by the club as prejudicial to its interest . . . .<sup>78</sup>

The court also found that the league's board of directors, and not the president, had the power to supervise the disciplinary actions of the teams and to require that such action be taken.<sup>79</sup>

This was the league president's authority over the American League during the 1919 World Series. In February 1920, Garry Herrmann resigned as chairman of the Commission, and American League President Johnson and National League President John Heydler failed to select a replacement by the start of the 1920 season.<sup>80</sup> The owners then resurrected a plan first proposed in 1919 to have the game governed by a prominent citizen, such as General John Pershing or Senator Hiram Johnson.<sup>81</sup> On November 11, 1920, the owners agreed to a two-league organization headed by Judge Landis as the sole arbiter, and they signed

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73. *American League*, 109 Misc. at 144-49, 179 N.Y.S. at 502-04.

74. *Id.* at 140-44, 179 N.Y.S. at 500-02.

75. *Id.* at 143, 179 N.Y.S. at 501.

76. *Id.*, 179 N.Y.S. at 501.

77. *Id.* at 143, 179 N.Y.S. at 502.

78. *Id.* at 144-45, 179 N.Y.S. at 502.

79. *Id.* at 149-50, 179 N.Y.S. at 505.

80. E. ASINOF, *supra* note 18, at 138.

81. *Id.* at 199.

the Major League Agreement establishing the Office of the Commissioner and the Major League Executive Council on January 12, 1921.<sup>82</sup>

Since its inception, the Commissioner's Office has enjoyed a unique authority recognized by the courts.<sup>83</sup> For example, *Major League Rule* 12(a) states that no assignment between a Major League club and a National Association (minor league) club "shall be recognized as valid unless . . . approved by the Commissioner."<sup>84</sup> When the American Association's minor league Milwaukee team tried to enjoin Landis from voiding the contract of outfielder Fred Bennett, which established an option with the St. Louis Browns, the United States District Court for the Northern District of Illinois upheld Landis' refusal to approve Bennett's assignment to Milwaukee and to declare Bennett "absolved from the burdens of the same and of his contract with St. Louis."<sup>85</sup> The court found that the Commissioner had "all the attributes of a benevolent but absolute despot" whose decisions "should be absolutely binding."<sup>86</sup>

Courts have accorded similar judicial respect to the Commissioner's authority to protect the best interests of the game.<sup>87</sup> In December 1976, Commissioner Bowie Kuhn suspended Atlanta Braves owner Ted Turner for the 1977 season and prohibited the Braves from exercising their first-round draft choice in the June 1977 amateur free agent draft because Atlanta had tampered with free agent Gary Matthews of the San Francisco Giants.<sup>88</sup> Kuhn focused on statements made by Turner at a cocktail party in October 1976 in New York, during which Turner told Giants co-owner Robert Lurie that he would do anything to get Matthews and that he would pay whatever price necessary.<sup>89</sup> Kuhn ruled that Turner's statements opposed the collective bargaining agreement and Kuhn's own directives concerning dealings with free agents, and were therefore "not in the best interests of Baseball."<sup>90</sup>

Turner challenged Kuhn's ruling as an abuse of discretion, and the United States District Court for the Northern District of Georgia agreed in part.<sup>91</sup> It upheld Turner's suspension, based on the Major League Agreement: "Judicial review of every sanction imposed by the Commis-

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82. *Id.* at 225; MAJOR LEAGUE AGREEMENT preamble (1975).

83. *See, e.g.,* Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 527 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); Atlanta Nat'l League Baseball Club v. Kuhn, 432 F. Supp. 1213 (N.D. Ga. 1977); Milwaukee Am. Ass'n v. Landis, 49 F.2d 298 (N.D. Ill. 1931).

84. MAJOR LEAGUE RULE 12(a) (1976).

85. *Milwaukee Am. Ass'n.*, 49 F.2d at 302.

86. *Id.* at 299, 302.

87. *Finley*, 569 F.2d at 527; *Atlanta*, 432 F. Supp. at 1213.

88. *Atlanta*, 432 F. Supp. at 1217.

89. *Id.*

90. *Id.*

91. *Id.* at 1223.

sioner would produce an unworkable system that the Major League Agreement endeavors to prevent.”<sup>92</sup> Despite this language, the court found that denial of the Braves’ June draft choice was “simply not among the penalties authorized” for the offense of acting against the best interests of the game.<sup>93</sup> The punitive measures available to the Commissioner included a reprimand, deprivation of a club’s representation at joint meetings, suspension or removal of an officer or employee of a league or club, temporary or permanent ineligibility of a player, and a fine.<sup>94</sup> Kuhn’s decision to deprive Atlanta of its first-round amateur draft choice exceeded authorized sanctions and was therefore void.<sup>95</sup>

Oakland A’s owner Charles Finley challenged Kuhn’s authority to disapprove the sale of Joe Rudi and Rollie Fingers to Boston and of Vida Blue to the New York Yankees in 1976 on the grounds that the sales were “inconsistent with the best interests of baseball.”<sup>96</sup> Finley argued that the Commissioner could invoke the “best-interest” clause only in situations involving rules violations or moral turpitude. The Seventh Circuit disagreed and held that the Commissioner is vested with the authority to take whatever action he deems appropriate upon finding an act, transaction, or practice to be contrary to the best interests of baseball.<sup>97</sup>

## II

### “You Bet”: U.S. Gambling Laws in 1919 and 1989

The antitrust status of Major League Baseball and the creation of the Office of the Commissioner were not the only forces that shaped the Black Sox and Pete Rose cases. The development of federal and state gambling laws also molded events in 1919 and 1989. Although some states allow betting on horse races, dog races, and jai-alai,<sup>98</sup> betting on

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92. *Id.*

93. *Atlanta*, 432 F. Supp. at 1223.

94. *Id.* (quoting MAJOR LEAGUE AGREEMENT, art. I, § 3).

95. *Id.* at 1226. Kuhn also lost a battle to former New York Yankee owner George Steinbrenner, who won a temporary restraining order from the New York State Supreme Court that prevented Kuhn from conducting a hearing into actions and comments made by Steinbrenner after the 1983 “pine tar game,” in which a home run by Kansas City Royals third baseman George Brett was disallowed because Brett had too much pine tar on his bat. Steinbrenner claimed that Kuhn could not give him a fair hearing, but Steinbrenner withdrew the suit and paid a fine during the hearing for a preliminary injunction. Chass, *Judge Blocks Giamatti’s Hearing on Betting Charges Against Rose*, N.Y. Times, June 26, 1989, at 1, col. 1.

96. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 531 (7th Cir.), cert. denied 439 U.S. 876 (1978).

97. *Id.* at 531, 535, 539.

98. Church, *Why Pick On Pete?*, TIME, July 10, 1989, at 18.



other sporting events is generally a crime in every state except Nevada.<sup>99</sup> Illinois has had a statute against bookmaking and pool selling since 1887,<sup>100</sup> but when the federal government shut down race tracks as a result of World War I, many gamblers turned to baseball.<sup>101</sup> The current Illinois statute, modeled on the 1887 law, states that a person commits gambling when he or she

[m]akes a wager upon the result of any game, contest, or any political nomination, appointment or election; . . . [or k]nowingly owns or possesses any book, instrument or apparatus by means of which bets or wagers have been, or are, recorded or registered, or knowingly possesses any money which he has received in the course of a bet or wager.<sup>102</sup>

Despite the presence of its gambling law, Illinois did not have a sports bribery statute at the time of the Black Sox trial in 1921.<sup>103</sup>

The three states in which Pete Rose allegedly placed bets—Ohio, Florida, and New York—all prohibit gambling.<sup>104</sup> The statutes in Florida and New York are similar to those in Ohio, which state, "No person shall: engage in bookmaking, or knowingly [sic] engage in conduct that facilitates bookmaking. . . . [A] person facilitates bookmaking if he in any way knowingly aids an illegal bookmaking operation, including without limitation placing a bet with a person engaged in or facilitating illegal bookmaking."<sup>105</sup> Ohio law further prohibits sports bribery: "No person shall knowingly . . . offer, give, solicit or accept anything of value to corrupt the outcome of any athletic or sporting event [or e]ngage in conduct designed to corrupt the outcome of any athletic or sporting event."<sup>106</sup>

In addition to state regulation of gambling, the federal government has become involved when the states failed to enforce local law or appeared to be influenced by large-scale gambling operations.<sup>107</sup> Congress has been concerned mainly with interstate, organized racketeering and has passed several laws to combat it.<sup>108</sup> Anyone who carries out a scheme utilizing interstate facilities for transportation or communication

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99. NEV. REV. STAT. ANN. § 463.0193 (Michie 1989).

100. 1887 Ill. Laws 95.

101. E. ASINOF, *supra* note 18, at 13.

102. ILL. ANN. STAT. ch. 38, para. 28-1(a)(2) (Smith-Hurd 1989).

103. Kirby, *The Year They Fixed the World Series*, A.B.A. J., Feb. 1, 1988, at 66. Illinois passed a sports bribery statute in the wake of the Black Sox' trial. See ILL. ANN. STAT. ch. 38, paras. 29-1, 29-2 (Smith-Hurd 1989).

104. See OHIO REV. CODE ANN. § 2915.02 (Baldwin 1989); N.Y. GEN. OBLIG. LAW § 5-401 (McKinney 1989); FLA. STAT. ANN. § 849.14 (West 1976).

105. OHIO REV CODE ANN. § 2915.02 (Baldwin 1989).

106. *Id.* § 2915.06 (Baldwin 1989).

107. I. ROSE, *GAMBLING AND THE LAW* 23 (1986).

108. See, e.g., 18 U.S.C. §§ 224, 1084, 1951-1955 (1988).

"to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest" is subject to fines of up to \$10,000, imprisonment of up to five years, or both.<sup>109</sup> A bookmaker who uses interstate wire communication facilities to transmit bets or "information assisting in the placing of bets or wagers on any sporting event or contest" could be fined up to \$10,000 or imprisoned for up to two years.<sup>110</sup> Under the Racketeering Influenced and Corrupt Organization laws (RICO), "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both."<sup>111</sup> An "illegal gambling business" is one that violates local law, involves five or more persons, and is in continuous operation for more than thirty days or has gross revenues of \$2,000 in a single day.<sup>112</sup>

Legalization of some forms of gambling began in the early 1960s after decades of illegality induced by scandals in the 1890s.<sup>113</sup> Even earlier, Nevada acted to legalize casino gambling in 1931 to help the state combat the Depression.<sup>114</sup> Currently, casinos in Puerto Rico, New Jersey, and Nevada offer a full range of gambling games, but only Nevada allows sports betting.<sup>115</sup> Americans bet \$2 billion with legal bookmakers in 1988, and from 1984 to 1989, all kinds of wagering increased fifty-seven percent.<sup>116</sup> In that period, casinos took in more than half of all bets (a total of \$164 billion), and sports gambling accounted for the second-largest take at \$28 billion.<sup>117</sup> In addition to legal gambling, conservative estimates put the total amount bet on sports illegally in the tens of billions of dollars each year.<sup>118</sup>

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109. *Id.* § 224.

110. *Id.* § 1084.

111. *Id.* § 1955(a).

112. *Id.* § 1955(b).

113. I. ROSE, *supra* note 106, at 2.

114. *Id.* at 25.

115. P.R. LAWS ANN. tit. 15, § 71 (1988); N.J. STAT. ANN. § 5:12 (West 1988); NEV. REV. STAT. ANN. §§ 463.010, 463.0193 (Michie 1986).

116. Church, *supra* note 98, at 17.

117. *Id.* at 18.

118. I. ROSE, *supra* note 106, at 4.

### III

## Black Sox and Gold's Gym: The 1919 World Series and the Allegations Against Pete Rose

### A. The Scandals of 1919 and 1989

#### 1. 1919: *The White Sox Turn Black?*

In all probability, the Black Sox scandal was set in motion by the general awareness that illegal bets would be placed on the 1919 World Series. One source on the scandal said that first baseman Chick Gandil approached gambler Joseph "Sport" Sullivan three weeks before the World Series while the White Sox were in Boston and said that a group of players would throw the Series for \$80,000.<sup>119</sup> After recruiting Cicotte, Risberg, McMullin, Williams, Weaver, Jackson, and Felsch, Gandil held a meeting in New York with these players on September 21. He explained that they would receive the \$80,000 in advance. They postponed arranging the details of throwing the games until they knew how the gamblers wished to manipulate the odds.<sup>120</sup> Former major leaguer Bill Burns heard rumors at this time about plans for a fix and approached Cicotte and Gandil, who told him on September 18 that they would throw the Series for \$100,000.<sup>121</sup>

The actual source of the money for the scheme was New York gambler Arnold Rothstein.<sup>122</sup> Burns and his partner Billy Maharg met with Rothstein on September 23, but he turned down their request for \$100,000.<sup>123</sup> Around September 28, former featherweight champion Abe Attell, a member of Rothstein's entourage, told Burns that Rothstein had decided to finance the fix, but that Attell would handle the details.<sup>124</sup> Meanwhile, Sullivan met with Rothstein on September 26, and convinced him to pay off the players.<sup>125</sup> Sullivan received \$40,000 (the other half of the \$80,000 was to be paid after the Series) from Rothstein's partner Nat Evans (who used the name "Brown") on September 29 and gave only \$10,000 of it to Gandil, who in turn paid it all to Cicotte. At a meeting in Cicotte's hotel room with the Burns-Attell group of gamblers the night before Game One, the players agreed to throw the first two games, since Cicotte and Williams would be pitching.<sup>126</sup>

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119. E. ASINOF, *supra* note 18, at 7-8.

120. *Id.* at 19.

121. *Id.* at 23-24.

122. *Id.* at 29-30.

123. *Id.* at 26, 28.

124. *Id.* at 26, 29-30.

125. *Id.* at 31, 33-34.

126. *Id.* at 31, 34, 36-37, 44.

The White Sox accordingly lost both games, although they did not receive all the money they had been promised from either of their financial backers. In Game One, Cicotte gave up five runs in the fourth inning, and Chicago lost 9-1.<sup>127</sup> Gandil twice failed to hit with runners in scoring position in Game Two, and Williams allowed three men to walk and score in the fourth inning as the Sox lost 4-2.<sup>128</sup> After the second game, Attell and Burns paid Gandil \$10,000, which he kept for himself.<sup>129</sup> Pitcher Dickie Kerr, who was not in on the fix, won Game Three 3-0, but Cicotte committed two errors in the fifth inning of Game Four to yield the only two runs during Cincinnati's 2-0 win.<sup>130</sup> Sullivan paid Gandil \$20,000 after this game, which Gandil divided equally between Risberg, Felsch, Williams, and Jackson. (Weaver received nothing since it was clear he was not participating in the fix).<sup>131</sup>

In the next game, Williams surrendered four runs in the sixth inning after questionable plays by Risberg and Felsch, and Chicago lost 5-0.<sup>132</sup> Receiving no payment from the gamblers before Game Six, Gandil drove in Weaver for the winning run in the tenth inning for Kerr's second win, 5-4.<sup>133</sup> Cicotte won the next game 4-1, cutting the Reds' advantage to four games to three. To end the suspense, Sullivan hired a mobster to threaten the lives of Williams and his wife if Williams did not lose Game Eight.<sup>134</sup> In the first inning of that game, Williams threw fifteen pitches and gave up four hits and three runs while getting only one out as Cincinnati wrapped up the World Series, 10-5.<sup>135</sup> The day after the Series, Sullivan paid \$40,000 to Gandil.<sup>136</sup> Gandil disbursed \$10,000 to Risberg, \$5000 to McMullin, and \$25,000 to himself, bringing his total take to \$35,000.

## 2. 1989: Pete Rose's Alleged Baseball Betting

The information on which Giamatti relied to ban Pete Rose was less dramatic than the Black Sox affair and did not suggest that Rose deliberately tried to lose any games, but it did indicate a pattern of steady gambling activity over a longer period of time. Baseball investigators claimed that Rose bet on baseball games, including those of the Cincinnati Reds,

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127. *Id.* at 68-69.

128. *Id.* at 85-88.

129. *Id.* at 91.

130. *Id.* at 97, 102.

131. *Id.* at 103.

132. *Id.* at 105-06.

133. *Id.* at 109.

134. *Id.* at 114, 116-17.

135. *Id.* at 116-17.

136. *Id.* at 125.

from 1985 to 1987.<sup>137</sup> Between 1985 and 1986, Rose allegedly placed bets with Ron Peters, a bookmaker in Franklin, Ohio, through Tommy Gioiosa, a friend he had met at a local weight room called Gold's Gym. Peters stopped accepting Rose's bets in late 1986 because Rose allegedly owed him \$34,000. Rose also allegedly bet with an unidentified New York bookmaker who accepted Rose's money from Michael Bertolini, the director of Rose's baseball card shows. Evidence of these bets included checks made out by Rose to fictitious payees and cashed by Bertolini.<sup>138</sup>

After a falling out with Gioiosa in 1987, Rose reportedly used Paul Janszen (who helped Rose with his weight training) and Steve Chevashore to place bets with a Staten Island bookie named "Val." By May, Val refused to accept Rose's bets because Rose failed to pay his debts, so Rose turned again to Peters, with Janszen as the intermediary. According to the report given to the Commissioner, Rose usually bet \$2,000 on each game. From April 7 to July 4, 1987, Rose allegedly gambled \$852,600 on 390 games, 52 games involving the Reds.<sup>139</sup> The strongest documented evidence against Rose included betting sheets with his fingerprints, Janszen's betting notebook detailing Rose's bets on baseball and basketball between April and May 1987, Peters' betting records, and telephone records between Rose, Janszen, Chevashore, Val, and Peters from April 8 to July 5, 1987.<sup>140</sup>

**B. Conspiracies and "Best Interests": The Investigations into the Black Sox and Pete Rose**

*1. The Sources of Authority To Investigate: Illinois Law in 1919-1921 and the Major League Agreement in 1989*

While the Illinois Criminal Code of 1919 had no statutes prohibiting sports bribery, section 46 addressed conspiracies to injure the interests of other parties:

If any two or more persons conspire or agree together . . . with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or employment or property of another, or to obtain money or other property by false pretenses, they shall be guilty of conspiracy.<sup>141</sup>

Thus, at the time of the Black Sox trial, the State could convict a conspirator on the uncorroborated testimony of an accomplice, but convictions of conspiracy were difficult to obtain. Indicted witnesses have the right

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137. *Dowd Excerpts*, *supra* note 5.

138. *Id.*

139. *Id.*

140. *Id.*

141. E. ASINOF, *supra* note 18, at 204.

under the fifth and fourteenth amendments to refuse to testify against themselves. Thus, prosecutors needed confessions from the defendants.<sup>142</sup>

Under Article I, section 2 of the *Major League Agreement*, the Commissioner may

investigate "any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball;" determine, after an investigation, what preventive, remedial, or punitive action is appropriate, and . . . take such action; and hear and resolve any dispute between the Major Leagues.<sup>143</sup>

Under the *Major League Rules*, official acts of misconduct include agreeing to lose a game, presenting gifts to a player or umpire for helping to defeat another team, physically attacking a player or umpire during a game, and betting on ball games.<sup>144</sup> In the latter regard, the rules state, "Any player, umpire, or club or league official or employee, who shall bet any sum whatsoever, upon any baseball game in connection with which the bettor has no duty to perform, shall be declared ineligible for one year."<sup>145</sup> Players, umpires, or club or league officials or employees who bet on games "in connection with which the bettor has a duty to perform shall be declared permanently ineligible."<sup>146</sup>

The rules also declare that "any and all other acts, transactions, practices or conduct not to be in the best interests of Baseball are prohibited and shall be subject to such penalties, including permanent ineligibility, as the facts in the particular case may warrant."<sup>147</sup> The uniform manager's contract for the National League (including the one signed by Rose) incorporates these rules under paragraph five, which states, "The National League Constitution, Regulations and/or Rules and the Major League and Professional Baseball Agreements and Rules . . . are hereby made a part of this contract."<sup>148</sup>

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142. *Id.* at 241, 228, 230; see U.S. CONST. amends. V, XIV.

143. MAJOR LEAGUE AGREEMENT, art. I, § 2.

144. MAJOR LEAGUE RULE 21.

145. *Id.* § 21(d).

146. *Id.* § 21(d), cl. 2.

147. *Id.* § 21(f).

148. Complaint for Injunctive Relief, Declaratory Judgment, and Damages at Exhibit Q, *Rose v. Giamatti*, No. A8905178 (Ohio Ct. C.P., Hamilton Cty. Filed June 25, 1989). Paragraph nine of the Uniform Player's Contract incorporates as part of the contract the Major League Agreement, Major League Rules, league rules, and Professional Baseball Rules. See Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association, Schedule A (1990) [hereinafter Major League Baseball Basic Agreement].

## 2. *A Grand Jury Indicts the Black Sox*

The absence of such Major League rules in 1919 limited Comiskey's ability to find wrongdoing by his club. On October 15, 1919, six days after the end of the World Series, he publicly offered \$20,000 for information about any fix.<sup>149</sup> While withholding the World Series shares of the accused players (each was to receive a loser's share of \$3,154.27),<sup>150</sup> Comiskey hired private detectives to investigate whether any of the accused players had recently acquired a substantial amount of money. Finding that only Gandil's finances changed appreciably (he bought a new car, a new home, and several diamonds), Comiskey mailed the World Series checks and re-signed all of the players except Gandil, who had retired.<sup>151</sup>

Even if Comiskey had proof of the fix, firing the players and releasing them from their contractual obligations (including the reserve clause) would have been a bad business decision. The players would almost certainly have joined other teams with little fear of a suspension from the league or the National Commission, especially in light of Chairman Garry Herrmann's comment in December that "[t]he matter rests with Comiskey, who is responsible for the conduct of his players."<sup>152</sup>

The State of Illinois did not investigate the matter until almost a year later, when rumors of another baseball scandal surfaced. On August 31, 1920, Chicago Cubs President William L. Veeck received telegrams and phone calls claiming that day's game between his fifth-place Cubs and last-place Phillies had been fixed.<sup>153</sup> The *Chicago Herald and Examiner* investigated the rumors and printed an expose on September 4, charging that some of the Cubs had deliberately lost the game, 3-0.<sup>154</sup> Responding to public and political pressure, Illinois State's Attorney Maclay Hoyne (up for reelection in the Democratic primary on September 15) asked Chief Justice Charles MacDonald to convene the Grand Jury of Cook County. MacDonald granted the request on September 7, 1920. He announced that a three-week investigation would look into the allegation that bookmakers and gamblers had fixed the Cubs-Phillies game of

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149. E. ASINOF, *supra* note 18, at 129, 134.

150. *Id.* at 131. The Reds each received over \$5,000. *Id.* at 107.

151. *Id.* at 130-31; Kirby, *supra* note 101, at 66.

152. E. ASINOF, *supra* note 18, at 128, 135. Herrmann was also the owner of the Reds. *Id.* at 74. He and the other members of the National Commission did not undertake an investigation when Comiskey approached them after the first game of the 1919 World Series to confide his fears of a fix. *Id.* at 74-77.

153. *Id.* at 149.

154. *Id.* at 150.

August 31, in addition to the 1919 World Series and baseball gambling in general.<sup>155</sup>

The grand jury issued subpoenas on September 21. Testimony before the grand jury and newspaper investigations combined to implicate some of the White Sox. New York Giants pitcher Rube Benton told the grand jury on September 24 that he had heard that Cicotte, Gandil, Felsch, and Williams participated in the fix, and three days later the Philadelphia *North American* ran an interview with Billy Maharg (Bill Burns' partner) headlined "The Most Gigantic Sporting Swindle in the History of America!"<sup>156</sup> In that story, Maharg detailed which games of the World Series were fixed, the offer that Cicotte made to Burns about the fix, the promised payoff of \$100,000, and Attell's manipulations.<sup>157</sup>

With his name twice mentioned, Cicotte confessed his actions and inspired two other players to do the same. On September 28, in the office of Comiskey's lawyer, Alfred Austrian, Cicotte told Comiskey that he and some of the other players were "crooked." He appeared before the grand jury the next day, signed a waiver of immunity on the advice of a state's attorney, recounted the pressure he received from Risberg, McMullin, and Gandil, and described the meeting at which they planned the fix. He admitted to receiving \$10,000 and named Burns and Maharg as the primary gamblers.<sup>158</sup> On the same day, Jackson contacted Judge MacDonald, signed a waiver of immunity on Austrian's advice, and admitted that he had received \$5,000 for agreeing to go along with the plan.<sup>159</sup> Comiskey suspended the eight players after these confessions, which led Williams to confess to Alfred Austrian on September 29.<sup>160</sup>

Indictments for Sullivan and "Brown" (his real name was never discovered by the grand jury) followed Williams' confession, causing Arnold Rothstein to testify, even though he was not indicted. Rothstein, the only witness before the grand jury allowed the presence of counsel, minimized his association with the scandal by placing the entire blame on Attell. Hoyne and Austrian proclaimed Rothstein's innocence after his testimony.<sup>161</sup>

The grand jury handed down its final indictments on October 22, 1920, naming the eight ball players and five gamblers: Attell, Burns, Sullivan, the mysterious "Rachel Brown," and former major leaguer Hal

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155. *Id.* at 152-54. Hoyne lost the election to Robert Crowe. *Id.* at 154.

156. *Id.* at 159, 168. Benton was suspended from baseball for one year in 1922 for gambling. L. LOWENFISH & T. LUPIEN, *supra* note 16, at 109-10.

157. E. ASINOF, *supra* note 18, at 168-69.

158. *Id.* at 170, 173.

159. *Id.* at 176-77.

160. *Id.* at 179, 185.

161. *Id.* at 218-19.



Chase, who worked with Burns. The indictments included nine counts of conspiracy to defraud individuals and institutions in Illinois.<sup>162</sup> To quantify the injury to Comiskey's business, Austrian claimed the drawing power of the team declined \$300,000 and that player contracts worth \$230,000 were worthless, as exemplified by the Cubs' cancellation of their purchase of Weaver for \$75,000.<sup>163</sup>

The vague language of the charges caused a delay in the proceedings that led to a repaneling of the grand jury. The arraignment took place on February 14, 1921, with the defendant gamblers absent. Pre-trial maneuvering delayed the trial for four months, during which time the confessions of Cicotte, Jackson, and Williams, and other important papers disappeared.<sup>164</sup>

The State of Illinois and the American League worked together to establish the prosecution's case. State's Attorney Robert Crowe reconvened the grand jury, fearing that the gamblers formerly indicted would escape trial through their influential connections.<sup>165</sup> Five new indictments against Attell's partners, Carl Zork, Benjamin Franklin, David Zelser, and Ben and Lou Levi, were handed down.<sup>166</sup>

American League President Ban Johnson provided \$10,000 in league funds and hired two special prosecutors, actions that were permissible under an Illinois law that allowed interested third parties to hire lawyers to assist in the prosecution of certain cases.<sup>167</sup> Although Johnson and Comiskey were longstanding enemies and not on speaking terms,<sup>168</sup> the league president asserted his third-party rights by trying to find the best witnesses for the prosecution. Using the same strategy that Giamatti would employ during his investigation of Rose, Johnson offered legal protection for the witnesses appearing against the players. He shielded Maharg from indictment in exchange for his help in locating Bill Burns in Texas, and promised Burns immunity for providing testimony for the State (with the approval of a prosecutor who accompanied Johnson to Texas).<sup>169</sup>

Despite the issuance of arrest warrants at the end of April 1921 for all the defendants, Burns was the only indicted gambler closely tied to the scandal at the trial. Sullivan remained incognito while Chase was

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162. *Id.* at 225.

163. *Id.* at 204-05.

164. *Id.* at 231. Hoyne supposedly stole the records for Austrian and Rothstein as he was leaving office in November. *Id.* at 226.

165. *Id.* at 230-31.

166. *Id.* at 231.

167. Kirby, *supra* note 103, at 67.

168. E. ASINOF, *supra* note 18, at 75-76.

169. *Id.* at 233-34.

arrested in California, only to be released because of an improper warrant. Attell was arrested in New York but escaped extradition when his case was dismissed after a witness sent from Chicago failed to identify him.<sup>170</sup> Forced to rely solely on Burns, the State of Illinois was ready for trial.

3. *Commissioner Accuses Rose: "A Rose By Any Other Name . . ."*

The examination of Pete Rose's affairs that sparked his lawsuit against Giamatti included some of the same features as the investigations into the Black Sox, including the testimony of gamblers, an active press, and the scrutiny of the accused's financial records. In mid-February 1989, Paul Janszen and his girlfriend made allegations about Rose to Commissioner Peter Ueberroth. Ueberroth and National League President Giamatti, elected on September 20, 1988 to succeed Ueberroth on April 1, met with Rose on February 20 and asked him if he ever bet on Major League Baseball games. Rose denied the charges but conceded that he bet regularly on other sporting events.<sup>171</sup> After receiving more information, Ueberroth invoked the investigative powers granted by the *Major League Agreement* and hired John M. Dowd on February 23 to look more closely into Rose's supposed gambling. At this time, word spread through the baseball profession that *Sports Illustrated* was preparing an article based on information from Ron Peters, the Ohio bookmaker who claimed to have knowledge of Rose's baseball gambling. Just as newspaper allegations about the fixed Cubs-Phillies game helped spur Illinois officials to call the Cook County Grand Jury in 1920, Rose's supporters contend that the impending story in *Sports Illustrated* (printed March 21) pressured Ueberroth to conduct his own investigation.<sup>172</sup>

Based on information from Janszen, Dowd's investigation turned toward Peters, who received favorable treatment similar to that afforded Rothstein and Burns for their testimony by Illinois state attorneys in 1921. Facing charges of cocaine distribution and tax evasion, Peters was told in his formal deposition that in exchange for his "full and truthful cooperation with the Commissioner, the Commissioner has agreed to bring to the attention of the United States District Judge in Cincinnati, the fact that you were of assistance to us and that we believe that you have been honest and complete in your cooperation."<sup>173</sup> Peters told Dowd that he took bets for Rose from late 1984 to late 1986, and again

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170. *Id.* at 231-33.

171. Rose v. Giamatti, No. A8905178 (Ohio Ct. C.P., Hamilton Cty. Filed June 25, 1989) (Affidavit of A. Bartlett Giamatti at 5).

172. P. ROSE & R. KAHN, PETE ROSE: MY STORY 233-34 (1989).

173. Complaint for Injunctive Relief, Declaratory Judgment, and Damages at Exhibit F, Rose v. Giamatti, No. A8905178 (Ohio Ct. C.P., Hamilton Cty. Filed June 25, 1989).

in 1987, on professional football, college basketball, and Major League Baseball, including Reds games while Rose was a player and manager.<sup>174</sup> After Peters' testimony, Giamatti honored Dowd's promise and wrote to U.S. District Court Judge Carl Rubin on April 18 to say, "It is my purpose to bring to your attention the significant and truthful cooperation Mr. Peters has provided to my special counsel . . . . Based upon other information in our possession, I am satisfied Mr. Peters has been candid, forthright and truthful with my special counsel."<sup>175</sup>

Dowd deposed Rose on April 20 and April 21, and Rose gave hand-writing exemplars, tax returns, car lease arrangements, airline records, and bank check stubs. On May 9, Giamatti received Dowd's 225-page report, which came with seven volumes of exhibits, including transcripts of interviews and copies of gambling records. The report detailed Rose's gambling activity and highlighted his bets on baseball and the Reds from 1985-1987.<sup>176</sup>

Based on this information, Giamatti informed Rose of his intent to conduct the hearing on whether Rose's conduct was not in the best interests of baseball and whether Rose violated *Major League Rule 21(d)*, prohibiting betting on baseball games.<sup>177</sup> Unlike the formal rules of procedure and evidence that the district attorney of Cook County had to follow in presenting evidence to the grand jury in 1921, the *Major League Agreement* empowers the Commissioner to formulate rules of procedure to be followed during the discharge of his duties.<sup>178</sup> Ueberroth developed the most recent set of such rules, which includes the following:

- a requirement for written notice of the time and place of hearings;
- permission for the persons or organizations concerned with the hearing to appear and be heard in person, to present witnesses, to cross-examine witnesses, and to be represented by an attorney;
- the option for the proceedings to be "conducted in general like judicial proceedings and with due regard for all principles of natural justice and fair play, but the Commissioner may proceed informally whenever he deems it desirable"; and

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174. *Dowd Excerpts, supra* note 5.

175. Complaint for Injunctive Relief, Declaratory Judgment, and Damages at Exhibit G, *Rose v. Giamatti*, No. A8905178 (Ohio Ct. C.P., Hamilton Cty. Filed June 25, 1989). Judge Rubin was so appalled by Giamatti's letter that he turned over Peters' sentencing to another judge. Callahan, *The Darkening Cloud Over Pete*, *TIME*, July 3, 1989, at 57. Peters received a significantly reduced sentence of two years, compared to the maximum of 21 years. The government based its request for the reduced sentence on Peters' assistance in a grand jury investigation of Rose's taxes. Aldridge, *Rose Sues Giamatti, Reveals Allegations He Bet on Reds*, *Wash. Post*, June 20, 1989, at E5, col. 1.

176. See *supra* notes 137-40 and accompanying text.

177. Complaint for Injunctive Relief, Declaratory Judgment, and Damages at Exhibit J, *Rose v. Giamatti*, No. A8905178 (Ohio Ct. C.P., Hamilton Cty. Filed June 25, 1989).

178. MAJOR LEAGUE AGREEMENT, art. I, § 2(e) (1975).

- the option for the Commissioner to follow "established rules of evidence but may depart from them in cases in which the ends of justice will in his judgment best be subserved by so doing."<sup>179</sup>

In accordance with these rules, Giamatti planned to allow Rose to be represented by counsel and to present any statements or testimony of witnesses, provided that Rose notified Giamatti in writing two days in advance of the names and nature of the testimony of the witnesses. Any such witnesses would be subject to cross-examination. Further, Rose could present other evidence, submit briefs, and make arguments at the hearing.<sup>180</sup> Giamatti denied Rose's attorney's contention that his procedures and Dowd's report were not fair, but granted a 30-day extension, rescheduling the hearing to June 26, 1989.<sup>181</sup> In the interim, Rose filed suit to keep Giamatti from holding the hearing.

### C. The Trials

#### 1. People v. Cicotte

When the Black Sox trial began before Judge Hugo Friend on June 27, 1921, the defendants challenged the procedures used against them, taking the same stance that Rose would later take. They moved to quash the trial, charging that the indictments were illegal under Illinois law. Their motion was denied. Judge Friend ruled that there was sufficient evidence of five separate conspiracies:

- to defraud the public;
- to defraud White Sox catcher Ray Schalk;
- to commit a confidence game;
- to injure the business of the American League; and
- to injure the business of Charles A. Comiskey.<sup>182</sup>

179. Major League Baseball Commissioner's Rules of Procedure.

180. Complaint for Injunctive Relief, Declaratory Judgment, and Damages at Exhibit J, *Rose v. Giamatti*, No. A8905178 (Ohio Ct. C.P., Hamilton Cty. Filed June 25, 1989). If Rose were still a player at the time of the Commissioner's action, the Major League Baseball collective bargaining agreement would have dictated the procedure to be used. Under Article XII of the agreement, the clubs and the players' union recognize that a player may be subjected to disciplinary action for just cause by his club, his league, or the Commissioner. Major League Baseball Basic Agreement, *supra* note 148, art. XII. The usual grievance procedure does not apply to "a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball." *Id.* art. XI, § A(1)(b).

During a hearing to be conducted by the Commissioner within 30 days of the disciplinary action against a player, persons with a direct interest in the hearing may attend, an informal procedure will be used, players may be represented by a representative of the Players Association, parties may offer evidence that will not be subject to the legal rules of evidence for relevancy or materiality, all testimony must be taken under oath, and all witnesses who testify must be made available for cross-examination. *Id.* art. XI A(1)(b), Appendix A.

181. Exhibits M, N, O, P, *Rose v. Giamatti*, No. A8905178 (Ohio Ct.C.P., Hamilton Cty. Filed June 25, 1989).

182. E. ASINOF, *supra* note 18, at 240.

The jury was selected on July 15 and opening statements were made on July 18.

The prosecution's case rested on the theory that the defendants completed their conspiracy offenses when they agreed to fix the games.<sup>183</sup> The strongest evidence on this point came from the testimony of Burns and Maharg. Burns implicated all of the defendant players except Jackson who, Burns said, was not present at a meeting in Cicotte's room the morning before Game One. Burns further testified that he had promised the players that Attell would supply \$100,000 to throw the Series, and that the players agreed to throw the games in any order they were told. He admitted that the players did not get the entire \$100,000, but that he paid \$10,000 to Gandil after Game Two.<sup>184</sup> Maharg provided similar testimony on July 27.

Burns also described a meeting he had attended with Cicotte and Gandil in New York on September 18 as the White Sox were wrapping up the pennant. According to Burns, Gandil told him, "If I could get \$100,000, I would throw the World Series!"<sup>185</sup> This was the first suggestion that the idea for the fix came from the players and not the gamblers. On cross-examination, the defense tried to establish that the \$100,000 proposal came from Attell, but Burns repeated that it was the players' demand.<sup>186</sup> Although Burns and Maharg blamed the players for initiating the conspiracy, accounts of the trial indicate that no witnesses ever identified specific misplays by the eight players or offered expert opinions about their individual performances.<sup>187</sup>

Without proof of deliberate errors, weak hits, or easy pitches, the most significant proof of the players' participation in the conspiracy was their acceptance of money. The prosecution's best evidence on this point was the confessions of Cicotte, Jackson, and Williams before the grand jury. Although the original grand jury transcripts of the confessions and the waivers of immunity were still missing, Gorman requested to use as an alternative the testimony of grand jurors and court stenographers, who could read from their notes. After conducting a private interrogation of the players, however, Judge Friend ruled that the confessions had

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183. Kirby, *supra* note 103, at 68.

184. E. ASINOF, *supra* note 18, at 247-50.

185. *Id.* at 253.

186. *Id.* at 254.

187. Kirby, *supra* note 103, at 68. Some records, including subpoenas, indictments, and the verdict, are on file with the clerk of the Circuit Court of Cook County. E. ASINOF, *supra* note 18, at xii-xiii.

been made voluntarily and were admissible to implicate the confessors, but not other players.<sup>188</sup>

The text of the confessions helped to solidify the charges that the players took part in the conspiracy. Cicotte, Jackson, and Williams admitted that they made an agreement with gamblers to fix the World Series and had accepted cash: Cicotte received \$10,000 before Game One, and Jackson and Williams each received \$5,000 after Game Four.<sup>189</sup> Cicotte's confession detailed how he threw soft pitches and how his own deliberate errors led to both Cincinnati runs in Game Four.<sup>190</sup>

Despite connecting them to the scheme to throw the World Series, the confessions did little to establish the key element in a conviction for conspiracy: intent. The statute required "fraudulent or malicious intent wrongfully and wickedly to injure . . . another," and no evidence pointed to any intent beyond a mere desire to make money.<sup>191</sup> The defense focused on this weakness in the prosecution's case and called eight witnesses, including several teammates and manager William "Kid" Gleason, to further establish the lack of intent.

Comiskey's finances thus became the subject of the last defense witness's testimony. Unsuccessful in its attempt to firmly establish an absence of intent to conspire against Comiskey's business, the defense counsel tried to show at least that the White Sox organization suffered no financial setback after the 1919 World Series loss. Harry Grabiner, secretary of the team, testified that the team's gate receipts for 1920 were \$910,206.95, almost seventy-five percent higher than 1919's total of \$521,175.75.<sup>192</sup>

The trial ended with closing arguments from July 29 to August 2. The prosecution highlighted the confessions of Cicotte, Jackson, and Williams and argued that once the players and gamblers agreed to fix the games, they had formed an illegal conspiracy.<sup>193</sup> The State asked for a guilty verdict with five-year prison sentences and \$2,000 fines for each defendant.<sup>194</sup> Defense attorney Ben Short defined the law for the jury:

The State failed to establish criminal conspiracy. There may have been an agreement entered by the defendants to take the gamblers' money, but it has not been shown the players had any intention of defrauding the public or of bringing the game into ill repute. They

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188. E. ASINOF, *supra* note 18, at 260; Kirby, *supra* note 103 at 68. Judge Friend ruled that he would not allow the confessions as evidence unless the state could prove they were made voluntarily. E. ASINOF, *supra* note 18, at 257.

189. *Id.* at 172, 177, 186.

190. *Id.* at 172.

191. ILL. CRIM. CODE § 46 (1919), *quoted in id.* at 204.

192. E. ASINOF, *supra* note 18, at 265.

193. Kirby, *supra* note 103, at 68.

194. E. ASINOF, *supra* note 18, at 266.

believed any arrangement they may have made was a secret one and would, therefore, reflect no discredit on the national pastime or injure the business of their employer as it would never be detected.<sup>195</sup>

The judge's charge to the jury followed the defendants' interpretation of the law more closely than the prosecution's definition. Judge Friend told the jury, "The State must prove that it was the intent of the ballplayers and gamblers charged with conspiracy through the throwing of the World Series, to defraud the public and others, and not merely to throw ballgames."<sup>196</sup> The jury deliberated for about two hours in the early evening of August 2, 1921 and found the players and the gamblers not guilty.<sup>197</sup>

## 2. *Rose v. Giamatti*

Two factors distinguish the trial of 1921 from the proceedings in 1989. First, Rose, the manager, initiated the court action against Commissioner Bart Giamatti, unlike the Black Sox, who were brought into court under indictment. Second, unlike the earlier criminal proceedings, Rose's action was civil in nature, a complex amalgam of contract and due process arguments to prevent defendants Giamatti, Major League Baseball, and the Cincinnati Reds from conducting a hearing into Rose's alleged betting on baseball. Additionally, the *Rose* case also brought out such procedural issues as judicial review, choice of venue, and diversity jurisdiction.

Rose's complaint stated that he sought "injunctive and declaratory relief arising out of threatened irreparable harm to his reputation as one of the foremost participants in Baseball and to protect and preserve his right to be judged in a fair hearing by an unbiased decisionmaker."<sup>198</sup> Specifically, he sought immediate injunctive relief to restrain Giamatti's June 26 hearing. Rose grounded his complaint on seven claims for relief, with the most important being breach of contract.

The breach of contract theory centered on the idea that Giamatti was contractually bound to Rose to conduct all phases of his proceedings in accordance with the Rules of Procedure as required by the *Major League Agreement*.<sup>199</sup> Rose claimed that Giamatti, the trier of fact, had circumvented the Rule of Procedure to conduct the proceedings "in general like judicial proceedings" by becoming improperly involved in the investigation and by determining that Peters had given truthful testi-

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195. *Id.* at 268.

196. *Id.* at 270.

197. *Id.* at 272.

198. Complaint for Injunctive Relief, Declaratory Judgement, and Damages at 1, *Rose v. Giamatti*, No. A8905178 (Ohio Ct. C. P., Hamilton Cty. Filed June 25, 1989).

199. *Id.* at 27, para. 69.

mony before hearing Rose's account. Further, Rose could not confront his accusers, nor cross-examine them, particularly those named by Dowd. According to Rose, Dowd's report "would never be admissible in a fair hearing," thereby making its usage a violation of the requirement in the Rules of Procedure that the Commissioner follow "in general . . . the established rules of evidence."<sup>200</sup> Rose further alleged that Giamatti had allowed himself to become "actually biased and prejudiced against Pete Rose" and had also "refused . . . to give Pete Rose a fair chance to establish his innocence" by not recusing himself from the proceedings, by not allowing Rose a longer period of time to conduct discovery or to be present during the depositions of the witnesses in Dowd's report, and by not holding the hearing in Cincinnati.<sup>201</sup> In an ironic twist, Rose based his breach of contract claim on the same clause in his contract (paragraph 5) that subjected him to the *Major League Agreement* and the Major League Rules that forbid gambling.

The second claim of relief was based on implied covenants of good faith and fair dealing. These duties, according to the complaint, arose from Rose's contractual agreements to accept the discipline of the Commissioner and to forego the right of judicial recourse, from the Commissioner's express duties to uphold "the best interests of the national game of Baseball [and from the] Commissioner's fiduciary duty to Baseball and its participants."<sup>202</sup> The third claim for relief alleged that Giamatti breached this fiduciary duty.<sup>203</sup>

The fourth claim for relief centered on a policy argument similar to the substantive due process argument that the Black Sox raised at the beginning of their trial. Rose alleged a denial of procedural due process, claiming that social or business association members have certain due process and natural justice rights when they agree to subject themselves to an internal decisionmaker. Those rights, granted by public policy and Ohio law, include "reasonable notice and a hearing with a fair opportunity to defend the charges, an absence of bad faith, and compliance with the [association's] constitution, bylaws, and other rules and regulations."<sup>204</sup>

Citing correspondence from Giamatti pertaining to the investigation, Rose's fifth claim of relief was promissory estoppel. Rose said that Giamatti was bound by his previous characterizations of the proceedings, which were to conform to the *Rules of Procedure*, to provide Rose and

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200. *Id.* at 27, para. 70(d); see *supra* notes 179-81 and accompanying text.

201. *Id.* at 28-29, Exhibit M.

202. *Id.* at 24.

203. *Id.* at 30.

204. *Id.* at 30-31.



his counsel with any material information they requested about the investigation, and to keep Dowd from making any conclusions about Rose's guilt or innocence.<sup>205</sup>

The last two claims of relief grounded themselves in tort law. The sixth claim was one of negligence, and the seventh was tortious interference with economic relations. Rose alleged that Giamatti had intentionally and improperly interfered with Rose's contract with the Reds, and had improperly interfered with Rose's "advantageous economic relations with businesses that promote their products and services through using his name and likeness."<sup>206</sup>

Rose filed his complaint with the Court of Common Pleas for Hamilton County, Ohio on June 19, 1989. Judge Norbert Nadel held a hearing on Rose's motion for a temporary restraining order on June 22. Weighing the elements for injunctive relief,<sup>207</sup> Judge Nadel found irreparable harm to Rose if Giamatti's hearing were held as scheduled the next day and no harm to Major League Baseball or to the public if the hearing were not held. Further, while recognizing the reluctance of courts to become involved in the affairs of Major League Baseball, he addressed "the most difficult issue" in the case: whether Giamatti was an impartial and unbiased decisionmaker regarding Rose. Reading Giamatti's letter to Judge Rubin into the record and calling Peters "Peter Edward Rose's chief accuser," Nadel held that the Commissioner had prejudged Rose and the scheduled hearing would be "futile, illusory, and the outcome a foregone conclusion." Accordingly, he granted Rose's motion for a fourteen day temporary restraining order and scheduled a hearing on the preliminary injunction for July 6.<sup>208</sup>

Just as local politics may have colored the decisions of Illinois state attorneys in 1919, local pressures may have influenced the next steps in Rose's case. Judge Nadel was up for reelection in 16 months when he granted the restraining order, and some legal experts considered his decision a hometown ruling for a local hero.<sup>209</sup> After Ohio's First District Court of Appeals in Cincinnati denied Giamatti's motion to suspend the restraining order because such orders are not appealable, Giamatti sought to remove the entire case to the United States District Court for

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205. *Id.* at 31-32.

206. *Id.* at 33.

207. *See, e.g.,* *Dodd v. Rue*, 64 Ohio Misc. 21, 27-28, 411 N.E.2d 201, 206 (Ohio Ct. C.P., Hamilton Cty. 1979) (The elements considered by the judge were the irreparable harm to the plaintiff if the injunction were not granted, the prospect that the harm would be outweighed by the harm to the defendant, and the lack of harm to the public).

208. *Excerpts from the Ruling by Judge Nadel*, N.Y. Times, June 26, 1989, at C4, col. 2.

209. Lieber & Neff, *The Case Against Pete Rose*, SPORTS ILLUSTRATED, July 3, 1989, at 10, 14.

the Southern District of Ohio, Western Division, in Cincinnati.<sup>210</sup> That court in turn immediately transferred the case to the Eastern Division in Columbus: "Plaintiff is not just another litigant. He is instead a baseball figure of national reputation closely identified with the Cincinnati Reds and the City of Cincinnati."<sup>211</sup> Judge Nadel postponed the July 6 hearing while Rose's attorneys had two weeks to file arguments to keep their suit in state court.

Federal District Judge John D. Holschuh heard the arguments on July 20 and faced a crucial jurisdictional question. Federal courts have "diversity" jurisdiction when the amount in controversy exceeds \$50,000 and the action is between citizens of different states.<sup>212</sup> As defendants, Giamatti was a citizen of New York and the Cincinnati Reds team was a citizen of Ohio. As one of the teams in Major League Baseball, the Reds caused the league to be a citizen of Ohio for diversity purposes. If either the Reds organization or Major League Baseball was a party properly joined in the action, the diversity of citizenship between the plaintiff and all the defendants would be defeated, causing the district court to remand the case to state court.<sup>213</sup>

On July 31, Judge Holschuh decided the jurisdictional questions in favor of Giamatti. He considered first the doctrine of fraudulent joinder which prohibits a plaintiff from naming a nondiverse defendant against whom the plaintiff has no real cause of action, thereby defeating a defendant's right of removal based on diversity of citizenship.<sup>214</sup> He then focused on the practice of disregarding nominal or formal parties to the action and determining jurisdiction only upon the citizenship of the real parties to the controversy.<sup>215</sup> The judge defined a "nominal party" as one who "has no interest in the result of the suit or no actual interest or control over the subject matter of the litigation."<sup>216</sup> Finding no controversy between Rose and the Reds, Judge Holschuh characterized the Reds as nominal parties and disregarded their citizenship for diversity purposes.<sup>217</sup> Similarly, the judge found that "Rose's controversy is not with Major League Baseball, but is with the office of the Commissioner

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210. *Rose v. Giamatti*, 721 F. Supp. 906, 909 (S.D. Ohio 1989). Giamatti's lawyers acted pursuant to 28 U.S.C. § 1441 (a) (1988), which states, "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court . . . embracing the place where such action is pending."

211. *Rose*, 721 F. Supp. at 908.

212. 28 U.S.C. § 1332(a) (1988).

213. *Rose*, 721 F. Supp. at 911, 913.

214. *Id.* at 913.

215. *Id.* at 914.

216. *Id.* at 914-15 (citations omitted).

217. *Id.* at 923.

of Baseball for the Commissioner's alleged failure to follow his own procedural rules."<sup>218</sup> The clubs of Major League Baseball "have no legal interest in the controversy," and were also disregarded as nominal parties.<sup>219</sup>

With his motion to remand denied, Rose appealed the decision to the United States Court of Appeals for the Sixth Circuit. The three-judge panel there unanimously rejected Rose's appeal on August 17, 1989.<sup>220</sup> Judge Holschuh scheduled a hearing on August 28 for Rose's request for a preliminary injunction against Giamatti's hearing.

During his consideration of the jurisdictional matters, Judge Holschuh hinted how he would rule on the injunction if Rose were to lose his appeal: "[T]he Major League . . . Rules' which are expressly incorporated into Rose's contract with the Cincinnati Reds are the extensive rules of conduct formally adopted by the members of Major League Baseball and not the procedural rules independently promulgated by the Commissioner which govern only his own proceedings."<sup>221</sup> Judge Holschuh found that when proceedings involve disciplinary matters, "the major league baseball clubs have made the Commissioner totally independent of their control."<sup>222</sup>

#### D. "Yer Out!": Permanent Ineligibility

##### 1. *Acquitted and Banned For Life (1921)*

As has been noted, during the fallout of the controversy generated by the allegations against the Black Sox, the Major Leagues created the office of Commissioner and selected former federal district court judge Kenesaw Mountain Landis to hold the position.<sup>223</sup> Determined to deal

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218. *Id.* at 918-19.

219. *Id.* at 921. *But see* Note, *Maintaining the Home Field Advantage: Rose vs. Federal Court*, 10 LOY. ENT. L.J. 695, 706 (1990) (authored by Kimberly G. Winner) ("[The court's] conclusion [to disregard Major League Baseball as a party for determining diversity jurisdiction] is wrong for two reasons. First, the court applied the wrong standard to evaluate whether Major League Baseball's citizenship may be disregarded. Second, the court misperceived the nature of the primary relief sought by Rose.").

220. *Rose v. Giamatti*, No. 89-8328, slip op. at 3 (6th Cir. Aug. 17, 1989). Rose had been granted a motion on August 11 for an order preserving the status quo pending his appeal. This order enjoined Giamatti from proceeding with Rose's disciplinary hearing scheduled for August 17. *See Rose v. Giamatti*, 721 F. Supp. 924, 928 (S.D. Ohio 1989).

221. *Rose v. Giamatti*, 721 F. Supp. 906, 916 (S.D. Ohio 1989). *But see* Note, *supra* note 219, at 708, 710 ("[T]he *Rules of Procedures* promulgated by the Commissioner do not exist separate and apart from the Major League Agreement, but rather spring from it . . . Since the entire Agreement is expressly incorporated into Rose's contract with the Reds, it is inherently more reasonable to find that all procedural rules that were promulgated pursuant to that agreement are also incorporated into Rose's contract.").

222. *Rose*, 721 F. Supp. at 906, 919.

223. *See supra* notes 81-83 and accompanying text.

forcefully with the scandal, the new Commissioner placed the eight previously indicted players on the ineligible list, even as the Grand Jury of Cook County prepared to reconvene for new indictments on March 14, 1921. Unlike the Yankees owners two years before who challenged Ban Johnson's cancellation of the sale of Carl Mays, Comiskey accepted Landis's decision and immediately gave the seven remaining players their formal unconditional release.<sup>224</sup>

Landis made the Black Sox's ineligibility permanent after their acquittal on August 2, 1921. He announced:

Regardless of the verdict of juries, no player who throws a ballgame, no player that undertakes or promises to throw a ballgame, no player that sits in conference with a bunch of crooked players and gamblers where the ways and means of throwing a game are discussed and does not promptly tell his club about it, will ever play professional baseball.<sup>225</sup>

Two of the players, Weaver and Jackson, sought unsuccessfully to be reinstated. Landis denied Weaver's request for reinstatement in December 1921; Weaver struck out six more times before subsequent Commissioners Happy Chandler and Ford Frick. Jackson never asked for reinstatement to the Major Leagues, but was denied the opportunity to be the player-manager of the Greenville, South Carolina minor league team in 1933 by Landis.<sup>226</sup>

Both Weaver and Jackson sued under their contracts after they were out of baseball. In 1921, Weaver took Comiskey to court to collect the remainder of the three-year contract he had signed in 1920 for \$7,500 per year. A federal court dismissed the case in 1924 when Weaver's attorneys failed to appear, and Comiskey settled out of court.<sup>227</sup> Jackson sued Comiskey in 1924 for \$18,000 —\$9,000 for each of the last two years of his three-year contract. At trial, Comiskey mysteriously produced Jackson's grand jury confession that had disappeared four years earlier, and he used it to prove Jackson's breach of contract. Based on his confession, the court determined that Jackson had committed perjury when he claimed innocence in the Black Sox conspiracy. Even though the jury awarded him \$16,711.04 as the balance of his contract, the verdict was set aside as based on perjury and the case was dismissed. Jackson settled out of court for a small part of his salary.<sup>228</sup>

Landis's actions, and Comiskey's acceptance of them, established the power and authority of the Commissioner. By finding the Commis-

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224. E. ASINOF, *supra* note 18, at 230.

225. *Id.* at 273.

226. *Id.* at 279, 281, 292.

227. *Id.* at 280.

228. *Id.* at 289-92.

sioner's disciplinary action against Pete Rose or any player to be beyond the control of the twenty-six major league clubs in 1989, Judge Holschuh continued this tradition of deference.

## 2. *Banned, Then Found Guilty: A Faded Rose*

While the Black Sox survived their courtroom battle only to lose the baseball war, Rose received his banishment from the game as part of a compromise to keep a court from deciding his case. On August 23, 1989, Rose and Giamatti signed a five-page agreement in which Rose "recognizes, agrees and submits to the sole and exclusive jurisdiction of the Commissioner" to investigate and determine what action is appropriate for acts "not in the best interests of the national game of baseball." Rose's attorneys executed a stipulation dismissing with prejudice *Rose v. Giamatti*, and Rose agreed to forego a hearing by the Commissioner by acknowledging that Giamatti had a factual basis for the penalty imposed.<sup>229</sup> Under Rule 21, Giamatti declared Rose permanently ineligible and placed him on the Ineligible List, where the Commissioner may put a person found guilty of acts under Rule 21 or convicted of a crime involving moral turpitude. Under Rule 15(c), Rose could have applied for reinstatement one year after being placed on the list, but he did not do so.<sup>230</sup>

It is not clear which provision of Rule 21 Rose violated. The agreement states that "nothing in this agreement shall be deemed either an admission or a denial by Peter Edward Rose of the allegation that he bet on any major league baseball game."<sup>231</sup> Nevertheless, Giamatti said, "In the absence of a hearing . . . and in the absence of evidence to the contrary, . . . I've concluded that [Rose] bet on baseball" and on the Reds.<sup>232</sup> Rose claims that he was banned under section (f) for associating with bookmakers and felons and placing illegal wagers with bookies on football and basketball games.<sup>233</sup> Rose said that he signed the agreement because even if he had won in court, "I still would have been banned for that associating with gamblers stuff."<sup>234</sup> Unlike some of the Black Sox

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229. *The Agreement*, USA Today, Aug. 25, 1989, at 100, col. 1.

230. *Id.*; MAJOR LEAGUE RULE 15(c); Chass, *Board Says Rose Is Ineligible for Hall of Fame*, N.Y. Times, Feb. 5, 1991, at B9, col. 2.

231. McCoy, *Maximum for Rose: Life*, The Sporting News, Sept. 4, 1989, at 10, col. 1; 12, col. 1.

232. *Id.* at 12.

233. P. ROSE & R. KAHN, *supra* note 172, at 236. Gioiosa has been convicted for tax evasion and conspiracy to distribute cocaine. Lieber & Neff, *Deeper and Deeper: Last Week Another of Pete Rose's Former Cronies Accused Him of Betting on the Reds*, SPORTS ILLUSTRATED, Feb. 12, 1990, at 50.

234. P. ROSE & R. KAHN, *supra* note 172, at 253. If Rose had not signed the agreement and had tried to challenge his suspension in court, such a suit based on antitrust liability might

who confessed to throwing the 1919 World Series, Rose continues to maintain his innocence. He claims that an expert says that the handwriting on the betting sheets is impossible to identify. Of the three fingerprints on the sheets, only one is clearly identifiable as Rose's. Rose speculates that Janszen, who handled much of Rose's autograph business, once handed him a piece of paper just to get a fingerprint. Finally, Rose points to a gambling expert who says that the sheets do not resemble real betting sheets with a set system.<sup>235</sup>

Despite his denial of the gambling charges, Rose's admission of guilt to federal tax violations has kept him in the ignominious company of the Black Sox on the Ineligible List. Eight months after his banning, Rose received the added stigma of being a convicted federal felon. He pleaded guilty on April 20, 1990 to two counts of filing false income tax returns in 1985 and 1987.<sup>236</sup> Federal officials began their investigation in April 1989, and, in addition to his conviction and subsequent jail term, required Rose to pay \$366,043 in back taxes, interest, and penalties, mostly on undeclared income from baseball card shows, memorabilia sales, and winnings from ten Pik Six horse races.<sup>237</sup> Rose received his sentence on July 19, 1990, which included five months in prison; one year of supervised release, the first three months of which were spent at a Cincinnati-area halfway house; 1,000 hours of community service at five inner-city elementary schools and a boys club; continued psychiatric treatment for his admitted gambling addiction; and a fine of \$50,000, plus \$100 in court costs.<sup>238</sup> Judge S. Arthur Spiegel said of the sentencing, "Mr. Rose must serve some time in a prison setting for his crime in order to main-

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have failed for three reasons. First, Major League Baseball is exempt from antitrust liability. *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922). Second, the Commissioner has wide latitude in protecting the best interests of the game. *See Atlanta Nat'l League Baseball Club v. Kuhn*, 432 F. Supp. 1213, 1222 (N.D. Ga. 1977); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 539 (7th Cir. 1978). Third, some courts have found that a league decision to ban an individual is not an antitrust violation under the right circumstances. *See, e.g., Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961). In *Molinas*, Jack Molinas of the Ft. Wayne Pistons was banned from the NBA for betting on his own team to win. The court found that disciplinary rules calling for such a suspension are reasonable restraints and necessary for the league's survival. The league acted reasonably because it had to maintain public confidence in the game (which had eroded after a series of gambling incidents) and effectuate its policies against gambling. *Id.* at 243-44 also Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1412 n.17 (1990) (authored by Matthew B. Pachman).

235. P. ROSE & R. KAHN, *supra* note 172 at 245, 246, 244.

236. Lieber & Wulf, *Sad Ending for a Hero*, SPORTS ILLUSTRATED, July 23, 1990, at 22, 24.

237. *Id.* at 24.

238. *Id.* at 22-23.

tain respect for the law and as a deterrent to others who might consider cheating on their taxes."<sup>239</sup>

#### IV Conclusion

Just as judges maintain consideration for the laws of their jurisdiction, the commissioners of sports uphold the integrity of their leagues' rules. The Commissioner of Major League Baseball, unfettered by potential liability under federal antitrust laws and enjoying broad powers under the *Major League Agreement*, occupies a unique position among commissioners of professional sports. He is "totally independent of [the clubs'] control" in disciplinary matters, and all the clubs themselves may be found to be "neutral bystanders" to a dispute between a player or manager and the Commissioner.<sup>240</sup> As the embodiment of Major League Baseball, Giamatti's successors will probably keep the Black Sox and Rose on the ineligible list in order to "maintain respect for the law" of baseball and to deter "others who might consider cheating" on the rules of the game.<sup>241</sup>

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239. Pascarelli, *Hustled Off to Prison: Rose Gets Five Months*, The National Sports Daily, July 20, 1990, at 4, col. 1, 5, col. 2.

240. *Rose v. Giamatti*, 721 F. Supp. 906, 919, 921 (S.D. Ohio 1989).

241. Rose is also ineligible for election into the Baseball Hall of Fame as long as he remains on baseball's ineligible list. At its February 4, 1991 meeting, the Hall of Fame's board of directors passed a resolution barring any player on baseball's ineligible list from appearing on the Baseball Writers Association of America ballot for the Hall of Fame. Chass, *supra* note 229, at B9, col. 4.

A player becomes eligible for the Hall of Fame five years after his retirement, which occurs in December 1991 for Rose. A screening committee selects the players that appear on the writers' ballot, and candidates remain eligible for 15 years if they receive at least five percent of the vote each year. If a player is not elected in that time, but received 60 percent of the vote in any one year, he would be considered for election by the Veterans Committee. If Rose is reinstated in more than 15 years, he could not be elected by the Veterans Committee because he would not have received any votes from the baseball writers. *Id.* at B11, col. 3.